Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Donald & Susan Zimmerman,

Petitioners,

v.

Commissioner of Internal Revenue,

Respondent.

On Petition for a Writ of Certiorari
To the Tenth Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

The Tenth Circuit Court of Appeals affirmed decisions of the United States Tax Court that stated Susan Zimmerman's petition was so lacking in merit it did not constitute a petition. The Tax Court ruled Donald Zimmerman's petition was also not a real petition and claimed he filed his notice of appeal untimely. These holdings raise five substantial federal questions warranting review by this Court:

1. Whether the court of appeals was also non-responsive to the petition.
2. Whether an entire statement of facts may be construed as "frivolous and groundless arguments" and, or to not exist consistent with fundamental principals of fairness and due process.
3. Whether the legal opinions of a non-party, non-witness may be accepted by a judge as true consistent with principals of fairness and due process.
4. Whether both the trial court and the appeals court failed to apply this Court's standard to a motion to dismiss.
5. Whether the refusal to apply this Court's standard was a denial of the right to due process.

PARTIES TO THE PROCEEDING

Donald and Susan Zimmerman are the petitioners. The commissioner of Internal Revenue is the respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald and Susan Zimmerman, petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit. The panel's decision is in plain contravention of the facts, current

law and holdings of this Court. The Tenth Circuit panel essentially denied review and its end was to plainly deny the Zimmermans due process and a fair trial. This Court has held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909). Because these flagrant violations of well-established basic principals appears to be nationwide and shock the conscience, review is warranted by this Court to stop the lawless actions of the inferior courts.

OPINIONS BELOW

The opinions of the Tenth Circuit (02-9004, 02-9005) panel are unreported. The tax court are numbers 8124-01 and 8127-01. These opinions are reproduced in the appendix.

JURISDICTION

The orders denying rehearing were entered on January 7, 2003. The jurisdiction of this Court rests upon 28 USC § 1254(a).

As shown below, substantial federal questions were raised in both the tax court and the court of appeals and neither court addressed them:

"We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right...as if it had been specifically referred to and the right directly

refused." Chapman v. Goodnow's Admin'r., 123 US 540, 548 (1887).

This Court has also held: "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights..." Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution provides that "No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

For approximately four years, individuals doing business as (D/B/A) the "Internal Revenue Service" (IRS) have been trying to take property from the Zimmermans. Velia Calvin (Calvin), allegedly representing the "IRS," set up several dates to meet with the Zimmermans. The Zimmermans were willing to meet with Calvin and wrote telling her they would meet with her together with counsel and a court reporter. Zimmerman told Calvin they wanted to know the facts her legal opinions were based on. Calvin cancelled each meeting and refused to meet with the Zimmermans.

The Zimmermans requested an administrative hearing or appeals consideration, and were refused. Instead of speaking with the Zimmermans, Calvin issued over sixty-five "summonses." Zimmerman filed a petition to quash on the grounds there were no facts to support Calvin's many legal opinions. Calvin's lawyer filed a motion for summary enforcement, an affidavit of good faith and requested a hearing. Once the hearing was set, Zimmerman, through counsel, issued and served a subpoena on Calvin to attend the hearing.

The assigned magistrate cancelled the hearing without explanation. Another hearing was set by Calvin's lawyer; another subpoena was issued and served on Calvin and again the hearing was cancelled without explanation. The motion for summary enforcement was granted without a hearing. More summonses were issued and Zimmerman's counsel filed a petition late.

The men and women D/B/A the "IRS" sent the Zimmermans a letter threatening a "NOTICE OF DEFICIENCY." The Zimmermans *again* offered to sit down and settle the matter so court could be avoided. The men and women D/B/A the "IRS" were again non-responsive. Four notices were mailed to the Zimmermans.

I. UNDERLYING LITIGATION.

Four identical petitions were filed into the tax court (two against the Zimmermans and two against trusts they are trustees of). The two against the trusts represent a "whipsaw" position and are actually attacks against the Zimmermans themselves. The grounds were: based on the complete non-responsiveness to factual inquiries, unwillingness to meet and the avoidance of cross-examination, the legal opinions of the three "IRS" employees (Calvin, John Tam, area director) were arbitrary: "But the maxim applies, *quod non apparet non est.* The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Being arbitrary the tax court is obligated to set-aside the notices, Helvering v. Taylor, 293 U.S. 507, 514.

The commissioner's lawyer, Dale Zusi (Zusi), filed two motions to dismiss the Zimmerman's petitions (8124-01, 8127-01). However, Zusi filed affirmative answers to the trust petitions (#8125-01, #8126-01).

Zusi alleged the two Zimmerman petitions were so lacking in merit they did not constitute petitions. Zusi alleged

there was no lettered statement of facts, no numbered assignments of error and contained nothing but frivolous legal arguments. The Zimmermans' response included pointing out this Court's standard to prevail in a motion to dismiss, the lettered statement of facts was "A-T," and their statement of facts was not mere legal opinions. Judge Wells agreed with Zusi and granted the motions. All post judgment motions were denied without explanation. Notices of appeal were mailed and Donald Zimmerman's was destroyed by the post office. The tax court and the Tenth Circuit panel refused to accept the notice as timely despite knowing all pleadings were mailed together.

A. The tax court decision. The tax court, judge Wells, was non-responsive and acted as a rubberstamp for the IRS. He construed facts as arguments and refused to comply with the rules of court, the due process clause and the holdings of this Court when he granted the motions to dismiss. The intent of his rulings was to deny the Zimmermans due process and a fair trial.

1. The burden of proof for a motion to dismiss. This Court has long held the burden of proof for a motion to dismiss is "beyond doubt;" this is higher than the burden in a murder trial: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This court has held: "Unless there is "`***indisputably absent any factual or legal basis***'" for the wrong asserted in the complaint, the trial court, "[i]n a close case," should permit the claim to proceed at least to the point where responsive pleadings are required. Ibid. (citation omitted)." Neitzke v. Williams, 490 U.S. 319, 323 (1989) (emphasis added).

This Court has also long held: "...it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, ***the allegations of the complaint should be construed favorably to the pleader***." Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) (emphasis added).

2. There is doubt. Doubt is established because four identical petitions were filed. The other two petitions are in ***pretrial*** and are set for an April tenth 2003 trial in the tax court in Salt lake City, Utah. Both courts flagrantly disregarded federal policy, the due process clause and the standards of this Court when the motions were granted and affirmed: "No matter how unlikely it may seem that plaintiff will prove its entitlement to relief, ***federal policy favors disposition on the proofs rather than on the pleadings***." 6th Camden Corp. v. Evesham TP., Burlington Cty., 420 F.Supp. 709, 720 (1976) (emphasis added).

The commissioner's entire case is based upon three witnesses. It is irrational to believe these witnesses are somehow ***infallible*** or that it is "beyond doubt" they could not be impeached and their testimony, including the "NOTICE OF DEFICIENCY," be stricken in its entirety. This casts the necessary doubt to be fatal to the motion.

Also, pretrial discovery in both cases in the tax court has provided the following admissions from the "IRS" to wit: "The notice of deficiency against the trust is based upon legal opinions and not facts" and "The notice of deficiency is arbitrary." These admissions prompted the commissioner's lawyer, Richard Kennedy, to file an untimely "motion to withdraw deemed admissions." With these admissions the only doubt to speak of is *if the commissioner can make his case*.

3. Petitions have a factual and legal basis. The facts are the "IRS" made legal opinions against the

Zimmermans. The Zimmermans asked for those facts and the "IRS" refused. There is a presumption there are no facts: "But the maxim applies, *quod non apparet non est*. The fact not appearing is presumed not to exist." Shepard v The Schooner Clara, 102 US 200, 202. Without facts, the opinions, the deficiency, is arbitrary and should be set-aside: "The fact that the Commissioner's determination of a deficiency was arbitrarily made may reasonably be deemed sufficient to require the Board to set it aside." Helvering v. Taylor, 293 U.S. 507, 514.

Without any facts to support their legal opinions, the "deficiencies" are "naked assessments" and "The determination of tax due then may be one "***without rational foundation*** and excessive," and not properly subject to the usual rule with respect to the burden of proof in tax cases. Helvering v. Taylor, 293 U.S. 507, 514-515 (1935)." United States v. Janis, 428 U.S. 433, 442 (1976) (emphasis added).

4. Both courts refused to construe the facts favorably to the Zimmermans. The only reasonable presumption raised by the refusal to sit down with the Zimmermans and provide the facts their legal opinions were based, including the vehement refusal to submit to cross-examination (this continues still with tax court judge Swift refusing to permit discovery and cross-examination of the three witnesses at trial), is there are no facts, *quod non apparet non est*.

Both courts were required to construe the non-responsiveness favorably to the Zimmermans. Instead, both courts construed the refusal to meet with the Zimmermans as "frivolous and groundless arguments." This is in direct contravention of this Court's holdings, Scheurer v. Rhodes, 416 U.S. 232, 236 (1974) "And, the complaint is to be liberally construed in favor of plaintiff." Jenkins v. McKeithen, 395 U.S. 411, 422 (1969).

5. Both courts based their opinions on the

opinions of defense lawyers. In both cases the lower courts based their opinions on nothing more than the opinions of defense lawyers who were neither parties nor witnesses in the litigation. Had the courts relied on the opinions of the three witnesses, then the necessary doubt to overcome the motion to dismiss is cast by the discovery rules and Rules 602 and 607 of the FRE.

The courts based their opinions on either the opinions of the defense lawyers, or their own personal opinion in contravention of Rule 605 FRE. In either case due process is denied because the Zimmermans were not permitted to confront those acting as witnesses against them.

II. PROCEEDINGS IN THE TENTH CIRCUIT COURT.

On appeal the Tenth Circuit panel took two full pages of text to explain why Donald Zimmerman's appeal was dismissed. However, Susan Zimmerman's review, which included a burden of proof higher than a murder case, was given one sentence. Not one of the issues was discussed; the panel stated its agreement with the tax court. This lack of explanation makes it appear to be a lack of review and a rubberstamp of the erroneous ruling of the tax court.

A motion for re-hearing en banc was filed and denied without explanation.

A. FEDERAL ISSUES RAISED BELOW AND NOT RULED ON. In each proceeding the foregoing federal issues were raised and each court was non-responsive. The burden of proof was not mentioned in either decision.

REASONS FOR GRANTING PETITION.

There are few reasons more important than those pre-

sented by this case. The public perception of the judicial system is damaged when judges flagrantly disregard long held principals, rules of procedure and the holdings of this Court. Despite knowing the law, and having it presented over and over again in pleadings, the tax court and the Tenth Circuit panel knowingly, and deliberately refused to comply with the due process clause and the holdings of this Court.

I. **Review is warranted because confidence in the system is eroded.** Review is warranted because both courts disregarded the holdings of this Court. Confidence in the system is lost when judges themselves refuse to comply with the rules. As shown below, unless this Court exercises its inherent supervisory jurisdiction, the lower courts will continue their lawless rule.

Evidence of this lawlessness is demonstrated by tax court judge Swift who is presiding over the Zimmermans' two other petitions, numbers 8125-01 and 8126-01.

Judge Swift is permitting a defense lawyer for the "IRS" to refuse to comply with discovery, judge Swift has refused to permit cross-examination of every witness against Zimmerman, has given the same "IRS" lawyer legal advice at least three times and has claimed to have delegated the "full authority of the [United States Tax] court" to this defense lawyer. This same judge is even acting as a witness against the Zimmermans. These shocking actions have prompted the Zimmermans to petition the Tenth Circuit Court of Appeals for a writ of mandamus after judge Swift refused to recuse himself in accordance with 28 U.S.C. 455(a).

II. **Review is warranted because the abuse is nation-wide.** The refusal to comply with the rules is not limited to this case; it is institutional and nation-wide. Zimmerman had two petition to quash cases where all discovery and cross-examination was denied. In the two tax

court cases the assigned judge, judge Swift, is denying Zimmerman the opportunity to cross-examine the only witnesses against them.

In Nis Family Trust v. Commissioner, 115 TC 523 (2000), the "IRS" refused to comply with discovery and refused to attend depositions. Despite this, the tax court granted judgment. Fifty thousand dollars in sanctions precluded review. This itself is a *deplorable* tactic of trial judges.

There is also the unreported case of Campbell v. Commissioner, No. 01-71355 from the Ninth Circuit court of appeals. The same errors were committed by tax court judge Wells and "review" consisted of a rubberstamp similar to this case. Unreported case #99-4286-GG, Case v. Webb, from the Eleventh Circuit Court of Appeals is another case where cross-examination was brazenly denied in the trial court and the appeal panel failed to mention the words "cross-examination" in the "decision." They failed to mention the words when this Court has consistently held: "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." Smith v. Illinois, 390 U.S. 129, 131 (1968). Despite being an "error of the first magnitude," the lower courts act as if it is a "harmless error" that doesn't warrant being mentioned.

There are also many other cases where tax court judges refuse to comply with the rules. This is why so many people who have been to the tax court characterize it as an "IRS rubberstamp."

This denial of cross-examination is rampant in not only federal cases, but in state traffic and tax cases as well. The California Board of Equalization and Arizona Board of Tax Appeals are just two examples of this. The California Court of Appeals recently upheld a wholesale denial of cross-examination by "presuming" there were probably even *more* witnesses the plaintiff's could not cross- examine, unreported

case number D039211. In that case the Board admitted the testimony of each witness was *inadmissible*: "the witnesses do not have personal knowledge of the facts of your case, your subpoenas were properly denied." Yet despite this, the unchallenged testimony was accepted: "with regard to the motion to exclude evidence, you have not provided any legal argument in support of your motion..." The Board acted as if the due process clause and § 702 of the California evidence code did not exist: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter."

A. Shocking actions of tax court judge Swift. As shown earlier, the recent actions of tax court judge Swift, the judge presiding over the Zimmermans other two petitions, shock the conscience. They include practicing law from the bench (a "high misdemeanor 28 U.S.C. 451), delegating the "full authority of the [United States Tax] court to a defense lawyer and a wholesale denial of cross-examination.

Judge Swift's flagrant abuse brings the judicial system into further disrepute and destroys the public's perception of said system. No one familiar with the Zimmermans' case would have any confidence to file a petition into the tax court. Judge Swift (and judge Wells) makes the tax court look like a mere rubberstamp for the "IRS." Why file a petition when a judge construes facts as arguments? No rational person would file a petition in the tax court knowing they are not going to get discovery, the judge will deny cross-examination of every single witness, give the "IRS" legal advice and the "full authority of the court,' and act as a witness himself.

B. Due process is an empty political phrase. If judges can get away with construing facts as mere arguments then due process is nothing more than political rhetoric. Pretending a statement of facts (A-T) is missing is chilling

and shocks the conscience. There can be no due process if judges are permitted to continue such acts.

A burden of proof is put into place to ensure each litigant gets due process and a fair trial. This Court has declared, *in no uncertain terms*, what that burden is with a motion to dismiss: "It is ***axiomatic*** that a complaint should not be dismissed unless "it appears ***beyond doubt*** that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957)..." McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246 (1980) (emphasis added).

This is why motions to dismiss are not favored by federal policy: "Motions to dismiss are generally viewed with disfavor and rarely granted." Wrenn v. State of Kansas, 561 F.Supp. 1216, 1220 (1983). In practice motions to dismiss are granted routinely in the tax court and against the "IRS" in general.

Due process is denied when a judge, on nothing more than a motion, silently decides it is "beyond doubt" the legal opinions of a revenue agent is not, and could not be arbitrary. Due process is denied when a reviewing court fails to mention this incredibiy high burden in their decision. The failure to mention the burden in its decision is clearly to deny the Zimmermans due process and a fair trial, Smithsonian Institution v. St. John, 214 U.S. 19, 28 (1909).

CONCLUSION

For the foregoing reasons this Court should grant the petition for a writ of certiorari.

Submitted this 14th day of March 2003.

Susan Zimmerman

Donald Zimmerman